

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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Notice of Proposed Rulemaking  
Establishing Rules Pursuant to 39 U.S.C. 404a

Docket No. RM2013-4

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**Joint Comments of  
Stamps.com and Endicia**

July 29, 2013

Stamps.com Inc. and Endicia, providers of PC Postage and related products and services, submit these joint comments pursuant to PRC Order No. 1739, "Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a" (June 5, 2013). We thank the Commission for this opportunity.

Stamps.com Inc. and Endicia fully support the Commission's proposed procedural rules for complaints challenging Postal Service actions that run afoul of 39 U.S.C. § 404a. This section of the Postal Accountability and Enhancement Act (PAEA) prohibits the Postal Service from engaging in three specified unfair and anticompetitive practices. It is important to have procedural rules for enforcing these restrictions. We also applaud the Commission for recognizing the need to create optional Accelerated Procedures for resolving alleged violations of 39 U.S.C. 404a, though we do propose some changes. We also agree with the Commission's substantive analysis of the

statute, including its discussion of the necessary elements in bringing a successful action or affirmative defense.

Our comments on the specific proposed rules are contained in the section-by-section comments below:

### **Section-by-section comments**

**§ 3032.1 *Applicability.*** Paragraph (b) states the rules in this part apply only to resolving complaints alleging violations of 39 U.S.C. § 404a. We support this treatment, but wish to point out that an action that violates 404a could also constitute a violation of other postal laws or PAEA requirements (e.g., unequal USPS-imposed mailing rules or fees could violate both 404a and other PAEA requirements). Complainants who contend that an agency action violates 404a should not lose their right to bring other claims based on the same set of facts.

We also wish to point out that actions that violate 404a could impact an entire industry, and thus complainants may wish to proceed jointly in contesting such actions. Complaint proceedings are also expensive and joint action could allow savings. We ask that the rules recognize this contingency and allow for joint filing of complaints.

In addition, actions that violate 404a could involve confidential information concerning the complainant, and in some cases even the public identification of the complainant could have far-ranging negative consequences. We ask that the rules recognize this contingency and specifically allow complainants to file actions under seal.

We also note that the filing of a complaint can trigger an unnecessary stranglehold in otherwise normal communications between the Postal Service and the

complainant. For example, when Gamefly, Inc. brought a complaint in Docket No. C2009-1, the Postal Service instructed all postal employees, including local field level personnel at mail processing facilities, to cease all direct communications with Gamefly. This prohibition on field-level communications resulted in inefficiencies, processing delays, and other unnecessary burdens on both the agency and the complainant. Whether this direction by the Postal Service resulted from retaliation or excessive precaution, it was improper and unnecessary. We therefore recommend that the PRC add a sub-paragraph that provides: “The Postal Service may not direct its employees, contractors, consultants, or other agencies or entities to change or cease normal channels or content of communications with a party because that party has filed a complaint or intervenes in such action.”

**§ 3032.5 *Unfair competition.*** We support the rules in this section, and particularly commend the Commission on paragraph (c), which defines the term “rule, regulation, or standard.” The Commission is right to define this term to include “other things, documents, and policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a government entity.” Indeed, violations of 404a are more likely to be attempted by the agency’s establishment of unfair or anticompetitive “standards” than through the more formal, time-consuming, and contemplative process of adopting new rules and regulations.

We concur in the Commission’s comments on page 8 of the June 5, 2013 Notice that 404a was intended to keep the Postal Service from improperly using its governmental authority to stifle competition. We also agree a broad definition of

“standards” is required to ensure that form is not elevated over substance. The Commission rightfully notes it would be inappropriate for the Postal Service to avoid 404a violations by titling its policies as “manuals” or “operating procedures” as opposed to regulations. The Postal Service has done exactly this in the procurement area. Effective May 19, 2005, it revoked the *USPS Purchasing Manual*, which had been issued as a binding regulation and incorporated by reference in the Code of Federal Regulations, and replaced it with the *Interim Internal Purchasing Guidebook*, which was supposedly non-binding. 70 Fed. Reg. 20291 (April 19, 2005). This was later replaced by the current 600+ page manual called the “Supplying Practices and Principles” (SPP), again under the rubric that these are just internal guidelines and not mandatory regulations.<sup>1</sup>

In light of this past history, we recommend that the Commission include within the ambit of “standard” the following terms: “instructions,” “manuals,” “guidelines,” “guidebooks,” “principles,” “standard operating procedures,” “courses of conduct,” and “administrative fees<sup>2</sup>.” This will prevent the Postal Service from jiggering with the nomenclature of its standards in an attempt to avoid actions challenging 404a violations. All of the proposed terms fall well within the term “standard” as used in 404a. Including

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<sup>1</sup> The Postal Service went to great lengths to make it seem as if these new rules were not rules. The Postal Service removed all section and paragraph numbering to make it appear as if these rules were not *de facto* regulations. See SPP, May 1, 2006. Realizing that the lack of reference aids made the SPP too cumbersome, the Postal Service eventually restored them. To this day, however, the SPP still states that the rules therein are “advisory and illustrative” only. SPP, February 1, 2013, p. 1.

<sup>2</sup> We include the term “administrative fee” as a 404a “standard” because 404a violations can arise from the Postal Service’s imposition of a fee on an outside party or its customers that creates an unfair competitive advantage for the Postal Service.

them in the Commission's definition of "standard" would preclude needless disputes on whether complaints based on such actions are properly before the Commission.

**§ 3032.6 *Disclosure, transfer, and licensing of intellectual property.*** We support this rule, and commend the Commission on paragraph (c), which recognizes that "an action that has an adverse effect on the value of intellectual property" is actionable under 404a(a)(2).

**§ 3032.7 *Unlawfully obtaining information.*** We support this rule, and particularly paragraph (c), which provides that consent must be "informed, uncoerced, and given only after the Postal Service has communicated adequate information and explanation about the risks of providing such consent."

As the Commission has recognized, it is particularly important that consent be uncoerced. Given its size, resources, and legal standing, the Postal Service frequently has substantial bargaining power and leverage over the parties it regulates and does business with. This can, and has, led the Postal Service to coercively seek consent from such parties. See *George P. Gurdak*, PSBCA No. 5049, 05-2 BCA ¶ 33,092 (October 12, 2005) (contract modification held non-binding because USPS coerced contractor into signing it). The Commission is therefore right to make clear in its regulations that the agency's affirmative defense of consent requires that such consent be informed and uncoerced.

Separately, we recommend a slight change to paragraph (a)(1) to conform more closely to the language in 39 U.S.C. § 404a(3). As proposed, paragraph (a)(1) states:

“The person filing the complaint has provided or sought to provide a product *to the Postal Service*.” [Emphasis added.]

The statute, 39 U.S.C. § 404a(3), does not require that the product be offered “to the Postal Service.” The product could be offered by a complainant solely to the public, and the Postal Service could obtain information from the complainant through other submissions, approvals, or concurrence. We therefore recommend striking “to the Postal Service” from the end of paragraph (a)(1).

**§ 3032.8 Statutorily authorized affirmative defense.** We support this rule, and particularly paragraph (b), which provides that assertions of authority under 39 U.S.C. 401 or 404 may not form the basis of an affirmative defense. This is a necessary procedural admonition because the assertion of an affirmative defense under those general statutory sections would make 404a a meaningless section of the PAEA. The affirmative defense exception in 404a requires the citation of a statutory provision that explicitly allows the Postal Service to engage in what would otherwise be prohibited under 404a.

**§ 3032.15 Depositions in non-accelerated section 404a complaint proceedings.** We support this rule to specifically allow for depositions in 404a actions. The Commission’s normal discovery process in rate and classification cases, which typically attract many parties and intervenors, is not as well suited to the discovery needed in 404a proceedings. Depositions will allow needed discovery to be

accomplished more quickly and efficiently than a series of interrogatories and follow-up interrogatories.

The Commission has limited the availability of depositions to non-accelerated proceedings. We agree that in many cases, the fast-moving pace of an accelerated proceeding may not allow time for depositions. We do not believe, however, that the Commission's rules should completely foreclose the possibility of depositions, under appropriate circumstances, in an accelerated proceeding.

**§ 3033.1 Applicability.** In paragraph (b), the Commission grapples with the problem presented when the same set of facts giving rise to a 404a violation also raises additional claims that could be pursued at the Commission, albeit not through accelerated procedures. The Commission has resolved this problem by taking the approach that a complainant seeking accelerated review must go “all in” on its 404a claim and sacrifice other related claims, no matter how meritorious. While we concur with the Commission that the accelerated procedure should be reserved for hearing 404a violations only, we do not believe that the election of accelerated procedures should require the complainant to release all of its other related claims. Such a harsh result is neither necessary nor contemplated in 404a itself. In our view, related claims should be held in abeyance, but not lost, if a complainant elects to proceed with the accelerated procedure.

The Commission states that it proposed the all-or-nothing rule to eliminate the possibility of: (1) requiring the Postal Service to litigate two complaints arising out of the same set of facts, and (2) the potential unfairness of divulging its litigation strategy at an

earlier stage than under non-accelerated procedures. While these are appropriate concerns, on balance they do not outweigh the drastic requirement that a complainant sacrifice its other related claims if it wishes, or needs, to employ accelerated procedures. The potential harms to the Postal Service described by the Commission could also be minimized by holding the related claims in abeyance while the 404a claim is being reviewed under accelerated procedures. In such case, responding to a second complaint in a later separate proceeding would not be much of a burden. In addition, holding related claims in abeyance would not require the Postal Service to reveal its litigation strategy on those claims until they were being adjudicated.

Another reason to allow related claims to be pursued under normal procedures is that discovery is not permitted under accelerated procedures. The lack of discovery could cause a complainant to be unable to meet its burden of proof in an accelerated proceeding. In such case, the complainant should not also be foreclosed from bringing its related claims, particularly if discovery would allow complainant to meet its burden.

In paragraph (c), the proposed rule prohibits the withdrawal of a complaint and refiling under part 3030 unless it is withdrawn prior to the Postal Service's answer or dismissed without prejudice. We bring to the Commission's attention the possibility that after filing an answer, the Postal Service could temporarily suspend, delay, or rescind the challenged action. In such case, the complainant should be allowed to withdraw the action or proceed under normal procedures. If the complainant elected to continue the action under normal procedures and Postal Service then sought to reinstate the



challenged action, the complainant should be allowed to return to accelerated procedures.

Separately, if the complainant determines during an accelerated proceeding that it wishes to pursue the matter using normal procedures, it should be permitted to do so without starting anew. For example, a complainant might elect to commence an action under accelerated procedures because of a concern that the challenged conduct could put it out of business if it does not obtain prompt relief. During the course of the accelerated proceeding, the complainant might find that the challenged action will not put it out of business, or that the Postal Service has temporarily postponed the challenged action, or that discovery is needed to prove its case or respond to an affirmative defense. In such cases, or where the parties jointly agree, the rules should allow the complainant to proceed with the action under normal procedures.

**§ 3033.6 *Complaint contents.*** Given the expedited timeline for processing an accelerated action, we appreciate the need for the initial complaint to be comprehensive. Paragraph (a)(6) requires “[p]roposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint.” It is requested that the Commission clarify whether the “conclusions of law” and “legal analysis” are to be considered separate submissions.

**§ 3033.7 *Answers.*** In proposed § 3033.6(a)(6), the complaint must contain “[p]roposed findings of fact.” Therefore, we suggest that the answer to the complaint be required to contain the Postal Service’s response to such proposed findings of fact.

**§ 3033.10 Complete statement of facts.** Paragraph (a) describes in detail what should be contained in the “statement of facts.” We note that proposed 3033.6(a)(b) also requires that a complaint contain “[p]roposed findings of fact.” We seek some additional clarity on the Commission’s different expectations for the “statement of facts” and the “proposed finding of facts.”

**§ 3033.15 Final order.** Paragraph (a) provides that the Commission will issue a final order on a complaint no later than 90 days after a complaint is filed. We support this rule because it provides a specific date by which the matter must be resolved. In some cases, however, the parties might mutually agree to extend the 90 day period. For example, the parties might agree to a slightly longer timeframe if the challenged conduct was not intended to take effect until after the 90 day period. In such cases, the Commission should have the authority to adjust the resolution period accordingly.

We thank the Commission for this opportunity to provide our comments and look forward to the institution of these new rules, as slightly amended based on comments received.

Respectfully submitted

s/ David P. Hendel

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